Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN H. LARY, JR.,

Petitioner,

v.

THE REPUBLIC OF CHINA, a foreign government,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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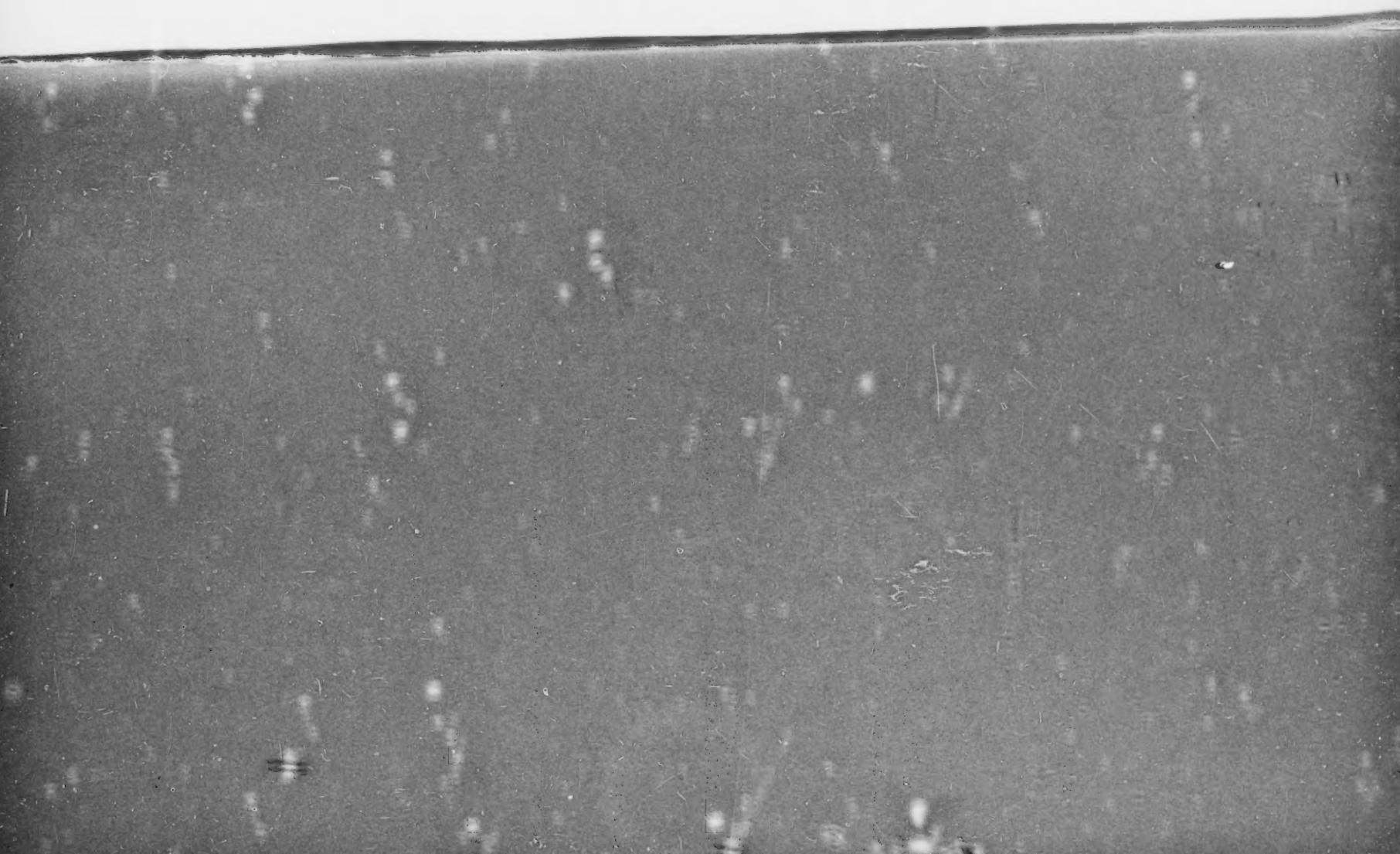

QUESTIONS PRESENTED

1. Should this Court consider issues which Petitioner presented in another case and lost?
2. Should this Court consider questions which were not raised in the court below?

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STATEMENT OF THE CASE

In his complaint as twice amended the Petitioner averred that he was the holder of quantities of (1) the 5% Hukuang Railways Gold Loan of 1911 Bearer Bonds ("Hukuang Bonds"), (2) the 5% Reorganization Gold Loan of 1913 Bearer Bonds, (3) the Lung-Tsing-U-Hai Railway Gold Loan of 1913 Bonds (the "1913 Lung-Tsing-U-Hai Bonds"), (4) the Lung-Tsing-U-Hai 8% Bonds of 1920, 1921 and 1923, and (5) the Liberty Bonds of 1937, (collectively the "Bonds").

With respect to default on the Bonds Petitioner averred that (1) the Respondent made no interest payments to holders of the Hukuang Bonds on or after December 15, 1930, and made no payment on the

principal on or after June 15, 1951, the due date of the Hukuang Bonds, (2) the Respondent made no interest payments to the holders of the 5% Reorganization Gold Loan of 1913 Bonds on or after July 1, 1939, and made no payment on the principal on or after July 1, 1960, the due date of these bonds, (3) the Respondent made no interest payments on the 1913 Lung-Tsing-U-Hai Bonds on or after January 1, 1920, and made no payment on the principal on or after January 1, 1953, the due date of the 1913 Lung-Tsing-U-Hai Bonds, (4) the Respondent made no interest payments on the 8% Lung-Tsing-U-Hai Bonds of 1920, 1921, and 1923 on or after January 1, 1926, and made no payments on the principal on or after January 1, 1933, the due date of the 8% Lung-Tsing-U-Hai Bonds, and (5) the Respondent made no interest payments to the holders of the Liberty Bonds on or after August 31, 1945, and made no payment on the principal on or after August 31, 1970, the due date of the Liberty Bonds.

With respect to extension of the due date of the Bonds, Petitioner averred that "Defendant, Republic of China, extended the due date of [the 1913 Lung-Tsing-U-Hai Bonds] to the year 1982," but he did not support this statement in any way on the record before the District Court, nor did he refer to it in any of his oppositions to Respondent's dispositive motions. Petitioner also averred that in 1947 China stated in writing that it intended to repay its external loans[1] and that the maturity date on the Hukuang Bonds

[1] The alleged written statement was set out in a brief in opposition to Respondent's first motion for judgment on the pleadings before the District Court and is set out on page 3 of the Petition.

had been extended to 1975. He drew these averments to the attention of the District Court in his brief in opposition to Respondent's first motion for judgment on the pleadings.

The Respondent moved once to dismiss and twice for judgment on the pleadings. The basis for all three motions was that the statute of limitations had run and that the FSIA had not revived the cause of action. In the second motion for judgment on the pleadings the Respondent also argued that the averments concerning the extension of the maturity date of the Hukuang Bonds and China's 1947 statement that it intended to repay its external loan did not establish an extension under Alabama law. The District Court granted the Respondent's motion (Pet. App. B-1), relying on *Jackson* v. *People's Republic of China*, 596 F. Supp. 386 (1984), a case arising out of China's default on the Hukuang Bonds, in which Respondent was a listed member of the certified class of plaintiffs.

The sole issue presented for review before the United States Court of Appeals for the Eleventh Circuit was whether the District Court had subject matter jurisdiction in a breach of contract case brought under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1330, 1332(a)(4), 1391(f), 1441(d), and 1602-1611 (1976), where the contract and breach occurred before 1952. Petitioner did, however, refer to the alleged 1947 promise to repay in his reply brief. The Eleventh Circuit affirmed the ruling of the District Court on the ground that "the FSIA does not apply retroactively to events or transactions occurring before its date of passage" (Pet. App. A-1), citing *Jackson* v. *Peoples' Republic of China*, 794 F.2d

1490 (11th Cir. 1986) (Pet. App. C-1-C7), *cert. denied* March 9, 1987 (No. 86-909).

REASONS WHY THE PETITION SHOULD BE DENIED

I. Because Petitioner has already litigated the issues presented in Sections I, II, and V of his Reasons for Granting Review in another case and lost, he is precluded from litigating them here.

Petitioner here was a listed member of the certified class of plaintiffs in *Jackson, supra*. That case addressed and decided against Petitioner the issues presented in Sections I, II, and V of the Petitioner's Reasons for Granting Review, to wit, (1) the status of the doctrine of foreign sovereign immunity before passage of the FSIA (Petition, pp. 4-16; Pet. App. C-4-C-6), (2) whether the FSIA should be applied retroactively to permit a suit based on default on the Hukuang Bonds (Petition, pp. 16-25; Pet. App. C-13-C17), and (3) the significance of the averred extensions of the Hukuang Bonds (Petition, pp. 27-28; Pet. App. C2-C3, C-16).

Allowing Petitioner to further litigate these issues would conflict both with *stare decisis* and the doctrine of defensive non-mutual preclusion, *Blonder-Tongue Labs.* v. *University Foundation*, 402 U.S. 313 (1971). Petitioner chose to bring the *Jackson* case, he chose the forum in *Jackson*, and he can hardly claim that he did not have a full and fair opportunity to litigate in *Jackson*. He is now precluded from proceeding in this case.

II. Because Petitioner failed to raise before the Eleventh Circuit the issues presented in Sections III, IV, and VI of his Reasons for Granting Review, he should not be permitted to present them to this Court.

In Sections III, IV, and VI of his Reasons for Granting Review, Petitioner argues that (1) the decisions of the District Court and the Eleventh Circuit violate the Eminent Domain Clause of the Constitution[2] (Petition, pp. 25-26), (2) the Executive Branch exceeded its Constitutional authority by supporting China's position in *Jackson, supra*, and the courts below wrongfully yielded to the Executive Branch (Petition, pp. 26-27), and (3) the Eleventh Circuit violated the Due Process Clause of the Constitution[3] by not accepting the averment in Petitioner's complaint as amended that China extended the due dates of the 1913 Lung-Tsing-U-Hai Railway Bonds to 1982 (Petition, p. 28).

These questions were not raised before the Eleventh Circuit. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim* v. *Miller*, 325 U.S. 231, 234 (1976); *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (question presented in petition for review but not in court of appeals is not properly before us). The Petition makes no showing why the ordinary rule should not apply.

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[2] U.S. Const. amend. V, §5.

[3] U.S. Const. amend. V, §4.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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